UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2032

EDWIN ATILIO VASQUEZ-VELEZMORO,	)
	)
Petitioner,	)
	)
vs.	)
	)
JOHN ASHCROFT,	)
ATTORNEY GENERAL,	)
	)
Respondent.	)

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

PETITIONER'S OPENING BRIEF

_____

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

On April 3, 2001, the Board of Immigration Appeals affirmed the Immigration Judge's decision finding that the Petitioner is removable pursuant to §212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (Act) stating that his offense of Possession of a Controlled Substance in violation of §3 of Article 42.12 of the Tex. Code Crim. Proc. is a conviction for immigration purposes prohibiting him from applying for cancellation of removal for a nonpermanent resident, even though this charge was later dismissed. See Matter of Roldan, Int. Dec. 3377 (BIA 1999).

The BIA incorrectly concluded that the 1996 statutory amendment to the definition of "conviction" provided at §101(a)(48)(A) of the Act, 8 U.S.C. §1101(a)(48)(A) (Supp. II 1996) repealed the Federal First Offender Act (FFOA) codified at 18 U.S.C. §3607. The adoption of the new definition of "conviction" for purposes of federal immigration law did not repeal, in whole or in part, provisions of the Federal First Offender Act under which expungement of first-time simple possession drug offenses results in protection against deportation. The amendment to the definition of "conviction" did not mention the FFOA, nor do any irreconcilable conflicts exist. The Petitioner respectfully requests 15 minutes of oral argument. The issue presented in this case is one of first impression in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE DECISIONS

STATUTES

The Immigration and Nationality Act of 1952, as amended

OTHER STATUTES

PRELIMINARY STATEMENT

This is a Petition for Review of the order of the BIA dated April 3, 2001 denying Petitioner's application for cancellation of removal for a nonpermanent resident based on his controlled substance violation pursuant to INA §212(a)(2)(A)(i)(II), 8 U.S.C. §1182(a)(2)(A)(i)(II). The BIA's decision was based solely on its prior interpretation of the definition of "conviction" in Matter of Roldan, Int. Dec. 3377 (BIA 1999). This decision was subsequently reversed by the Ninth Circuit. Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000) (consolidated on appeal with Matter of Roldan).

Jurisdiction in this Court is proper pursuant to §242(a) of the INA, 8 U.S.C. §1252(a) and IIRIRA §309(c)(1)(B) (case of alien in proceeding as of IIRIRA Title III-A effective date, including judicial review, shall continue to be conducted without regard to such amendments) and IIRIRA §309(c)(4)(E)(only appeal of discretionary decision under INA §244 is limited, not purely statutory decisions). Venue in this Court is proper because administrative proceedings before the Immigration Judge were conducted in their entirety within this judicial circuit; Mr. Vasquez-Velezmoro resides in Minnesota; and the Petition for Review was filed on May 2, 2001.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether Petitioner's offense of Possession of a Controlled Substance pursuant to §3 of Article 42.12 of the Texas Code of Criminal Procedure which was subsequently dismissed is a "conviction" for purposes of federal immigration law in light of the Federal First Offender Act?

Apposite Cases:

a. Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000) (consolidated on appeal with Matter of Roldan);
b. Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994);
c. Matter of Manrique, Int. Dec. 3250 (BIA 1995);
d. Matter of Marroquin, A90 509 015 LA (BIA 2/21/97).

STATEMENT OF THE CASE

On April 1, 1999, the Immigration Judge denied Petitioner's application for cancellation of removal under §240A(b) of the Act. On April 15, 1999, Petitioner filed with the Board of Immigration Appeals (hereinafter referred to as "BIA") an appeal contending that his controlled substance violation should not be considered a conviction for immigration purposes. On April 3, 2001, the BIA dismissed Petitioner's appeal, thereby declining to reconsider their decision in Matter of Roldan, Int. Dec. 3377 (BIA 1999). Roldan has been reversed by the Ninth Circuit. See Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000) (consolidated on appeal with Matter of Roldan).

Mr. Vasquez-Velezmoro seeks review solely on the BIA's legal interpretation of Matter of Roldan, Int. Dec. 3377 (BIA 1999) as it pertains to the facts of his case.

STATEMENT OF THE FACTS

Petitioner, Edwin Atilio Vasquez-Velezmoro, is a native and citizen of Peru. He entered the United States on February 25, 1985 without inspection. On June 19, 1986, Mr. Vasquez-Velezmoro was charged with the offense of Possession of a Controlled Substance pursuant to §3 of Article 42.12 of the Texas Code of Criminal Procedure. Mr. Vasquez-Velezmoro pleaded guilty and was sentenced to two years probation. On November 17, 1988 this judgment was set aside and dismissed by the court.

Mr. Vasquez-Velezmoro was served with a Notice to Appear on April 8, 1997 placing him in removal proceedings pursuant to INA §212(a)(6)(A)(i) of the Act, as an alien present in the United States without being admitted or paroled. On March 30, 1999, the INS lodged additional charges of deportability namely:

> §212(a)(2)(A)(i)(I) of the Act, as amended, in that you are an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude or an attempt or conspiracy to commit such a crime.
>
> §212(a)(2)(A)(i)(II) of the Act, as amended, in that you are an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to

> a controlled substance (as defined in §102 of the Controlled Substances Act, 21 U.S.C. 802.

Mr. Vasquez-Velezmoro filed an application for cancellation of removal for nonpermanent residents. On April 1, 1999, the Immigration Judge denied the Petitioner's request for cancellation of removal for a nonpermanent residents and ordered him deported to Peru. Mr. Vasquez-Velezmoro timely filed an appeal to the BIA on April 15, 1999. On April 3, 2001, the BIA dismissed his appeal. Petitioner has timely filed an appeal with Eighth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

This petition for review should be granted because the 1996 statutory amendment adopting the new definition of "conviction" for purposes of federal immigration laws did not repeal, directly or implicitly, the Federal First Offender Act (FFOA). Mr. Vasquez-Velezmoro was charged with the offense of possession of a controlled substance which was deferred and subsequently dismissed. Article 42.12 of the Texas Code of Criminal Procedure is analogous to the FFOA, which permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt, i.e., the offense is expunged and no legal consequences may be imposed as a result of the defendant having committed the offense.

Mr. Vasquez-Velezmoro, as a first-time offender of possession of a controlled substance under Texas law, whose sentence was subsequently dismissed does not stand "convicted" of a drug offense for purposes of immigration laws and thus cannot be removed from the United States. Additionally, as a matter of equal protection, benefits under the Federal First Offender Act must be extended to Mr. Vasquez-Velezmoro, whose offense was subsequently dismissed under a state rehabilitative statute because he would have been eligible for relief under the FFOA had his offense been

prosecuted as a federal crime. U.S.C.A. Const. Amend. 14; 18 U.S.C.A. §3607.

Mr. Vasquez-Velezmoro is eligible for cancellation of removal for a non-permanent resident.

STANDARD OF REVIEW

This case involves mixed questions of law and fact, therefore, the standard of review is far less deferential. Because the instant appeal is based upon the BIA's application of legal principles to undisputed facts, the standard of review of the BIA's denial of the cancellation of removal for a nonpermanent resident decision is de novo. Singh v. Ilchert, 63 F.3d 1501, 1506 (9th Cir. 1995).

ARGUMENT

I. THE COURT HAS JURISDICTION TO DETERMINE WHETHER VASQUEZ-VELEZMORO IS DEPORTABLE.

The INS alleges that the Petitioner is removable based upon a controlled substance conviction. But whether Vasquez-Velezmoro is in fact subject to deportation depends necessarily on whether, in light of the relief granted to him under Texas law, he stands "convicted" of a deportable offense. Because Mr. Vasquez-Velezmoro is contesting the BIA's finding that he is an alien removable by virtue of his prior state felony conviction, 8 U.S.C. §1252(a)(2)(C) is not applicable.

In that respect, the issues of deportability and jurisdiction tend to merge. The key to the court's jurisdiction, in other words, is the very issue it must decide at the outset, i.e., whether Vasquez-Velezmoro is deportable for having been "convicted" of a deportable offense. Plainly, it has the jurisdiction to decide that question. See e.g., Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000); Castro-Baez v. Reno, 217 F.3d 1057, 1058-60 (9th Cir. 2000); Coronado-Durazo v. INS, 108 F. 3d 210 (9th Cir. 1997); Souelti v. INS, 99 C.D.O.S. 5971, 5972 (9th Cir. 1999). Moreover, if the court were to conclude that Vasquez-Velezmoro was "convicted," it must under the INS's view of the court's jurisdiction retain jurisdiction to decide an

additional constitutional issue. Namely, whether the violation of his right to equal protection precludes a finding of deportability.

II. IN ENACTING §1101(A)(48), CONGRESS DID NOT INTEND TO PROFOUNDLY EXPAND THE SUBJECT MATTER OF THE DEFINITION OF CONVICTION IN ORDER TO ELIMINATE THE EFFECT IN IMMIGRATION PROCEEDINGS OF THE FFOA, FFOA STATE COUNTERPARTS, OR POST-CONVICTION RELIEF.

A. Section 1101(a)(48)(A) Defines a Conviction Ab Initio, and Does Not Control the Effect of the Federal First Offender Act or its State Analogues, or Whether a Subsequent Order Removes a Conviction as a Basis for Deportation.

The BIA in its decision asserted that Mr. Vasquez-Velezmoro became deportable when in 1996 Congress codified as 8 U.S.C. §1101(a)(48)(A) an altered version of the "definition of conviction" that had been set out in Matter of Ozkok, 19 I&N 546 (1988). Because his deferred adjudication for a first offense of simple possession of a drug was analogous to a disposition under the Federal First Offender Act ("FFOA"), 18 U.SC. 3607, it could not be treated as a conviction for any purpose, including immigration proceedings. Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994); Matter of Manrique, Int. Dec. 3250 (BIA 1995).

Furthermore, the BIA states that Petitioner's deferred adjudication under Texas law has specifically been found to constitute a conviction for

immigration purposes in the jurisdiction where his offense was committed. See Moosa v. INS, 171 F.3d 994 (5th Cir. 1999). This contention can disposed of swiftly. In Moosa, the alien was convicted of indecency with a child by contact, a second degree felony. Id. at 998. The court entered a deferred adjudication of guilty and place him on eight years of probation. Id. The fifth circuit held that this deferred adjudication was conviction for purposes of determining whether he was ineligible for permanent resident status. This case is distinguishable. In Moosa's case there is no comparable federal statute, i.e. which designates that a first time "sex offense" is not a conviction for any purpose. However, in the case at hand, the Federal First Offender Act designates in pertinent that:

> (a) If a person found guilty of an offense described in §404 of the Controlled Substance Act;
> (b) Has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and
> (c) Has not previously been the subject of a disposition under this subsection;
> (d) The court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. 18 U.S.C. §3607.

Furthermore, the Federal First Offender Act contains one subsection, (a), referring to pre-judgment probation which uses the language "found guilty" and "judgment of conviction" and another, (c), referring to

expungement for defendants under twenty-one. Subsection (b) states specifically that "a disposition under subsection (a) or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or ***for any other purpose***. (emphasis added.) See 18 U.S.C. §3607. In summary, the Federal First Offender Act is a limited rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offenses to avoid the drastic consequences which typically follow a finding of guilt in drug cases.

Mr. Vasquez-Velezmoro pled guilty to possession of a controlled substance and was sentenced to a deferred adjudication pursuant to §3 of Article 42.12 of the Texas Code of Criminal procedure with two years of probation. Article 42.12 read in pertinent:

> Sec. 5. (a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision … On expiration of a community supervision period imposed under Subsection (a) of this section, if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him. The judge may dismiss the proceedings and discharge a defendant …. a dismissal and discharge under this section may not be deemed a conviction for the

> purposes of disqualifications or disabilities imposed by law for conviction of an offense.

Article 42.12 of the Texas Code of Criminal Procedure is nearly identical to the Federal First Offender Act, therefore Mr. Vasquez-Velezmoro is eligible for Federal First Offender treatment under the provisions of 18 U.S.C. §3607(a); due to the fact that aliens who have been accorded rehabilitative treatment pursuant to a state statute, namely Article 42.12 of the Texas Code of Criminal Procedure, will not be deported if the alien establishes that he/she would have been eligible for Federal First Offender treatment had he been prosecuted under federal law.

An expungement or prejudgment probation under the Federal First Offender Act is not a conviction for immigration purposes. See 18 U.S.C. §3607; Matter of Manrique, Int. Dec. #3250 (BIA 1995). In Matter of Manrique, the Board of Immigration Appeals held that it would no longer treat as a conviction a disposition under a state rehabilitative statute where the defendant would have been eligible for Federal First Offender Act treatment had he or she been tried in federal court. Matter of Manrique, Int. Dec. #3250 (BIA 1995).

Mr. Vasquez-Velezmoro meets all of the criteria under Manrique, in that:

1) Mr. Vasquez-Velezmoro is a first offender;
2) Mr. Vasquez-Velezmoro has pled guilty to the offense of simple possession of a controlled substance;
3) Mr. Vasquez-Velezmoro has not previously been accorded first offender treatment under the law;
4) The court has entered an order pursuant to a state rehabilitative statute, §3 of Article 42.12 of the Texas Code of Criminal Procedure, under which the alien's criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation.

The BIA, however, overruled Manrique holding that an alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure. In re Roldan-Santoyo, Int. Dec. 3377 (BIA 3377).

The BIA engages in a two-step analysis to assert that the enactment of §1101(a)(48)(A) caused Mr. Vasquez-Velezmoro to become deportable. First they assert that in enacting §1101(a)(48)(A), Congress eliminated the immigration effect of state rehabilitative post-conviction relief such as deferred adjudication and expungement. Second they reason that since Congress has now barred the BIA from acknowledging the effect of any state rehabilitative post conviction relief, the BIA likewise cannot recognize equal protection of the laws extended to state analogues of the FFOA.

The BIA is wrong on both points. In enacting §1101(a)(48)(A), Congress did not demonstrate an intent to eliminate the immigration effect of any form of state post-conviction relief. Moreover, apart from any

possible intent to eliminate post-conviction relief such as expungement, Congress demonstrated no intent to repeal or limit the provisions of the FFOA or of FFOA state analogues.

The BIA opinion reaches its incorrect conclusion based on faulty reasoning concerning Congress' intent in enacting §1101(a)(48)(A), and how it intended that definition to change from the original set out in Matter of Ozkok. They assert when Congress codified the Ozkok "definition of conviction," minus the third prong, a great change in the subject matter and meaning of the definition of conviction is supposed to have taken place. They assert that whereas under Ozkok the definition of conviction only governed when a conviction occurs ab initio, upon codification this same definition minus the third prong exception both governs and has eliminated the immigration effect of post-conviction relief and of state analogues to the Federal First Offender Act ("FFOA"), 18 U.S.C. §3607.

It is undisputed that the definition of conviction as articulated in Ozkok only addressed and governed the standard for determining whether a conviction has occurred ab initio, and did not address and govern -- much less eliminate -- the immigration effect of the FFOA, its state analogues, or of post-conviction relief. Ozkok incorporated case law affirming the federal mandate that a disposition under the FFOA is not a "conviction" for any

purpose, including immigration, nor are analogous dispositions in state court. Subsequent BIA and federal court rulings have affirmed this interpretation. See, e.g., Paredes-Urrestarazu v. INS, 36 F.3d 801 (9th Cir 1994), Garberding v. INS, supra; Matter of Manrique, supra. Ozkok specifically upheld the effect of post-conviction relief, holding that an expungement would eliminate a conviction, as Ozkok had just defined the term, as a basis for deportation. 19 I&N at p. 552.

The BIA asserts that Congress overturned these longstanding rules when it enacted the statutory definition of conviction. To reach this conclusion, the BIA first asserts that when the first two prongs of the Ozkok definition of conviction were codified at § 1101(a)(48)(A), it added to its subject matter the immigration effect of the FFOA and post-conviction relief. The BIA next points out that the definition of conviction makes no mention of post-conviction relief or the FFOA; it only provides that a conviction is a finding of guilt and imposition of punishment or restraint. This, of course, is not surprising, since the three-pronged definition of conviction as it originated in Ozkok never addressed the issue of the immigration effect of the FFOA or post-conviction relief and therefore never included provisions regarding them. Finally, with true Alice-in-Wonderland logic, the BIA proclaims that since the definition of conviction

now "must" control the immigration effect of post-conviction relief and the FFOA, but fails to mention anything about it, the definition of conviction eliminates it.

This house of cards falls for at least two reasons. First, the statutory definition of conviction cannot be held to have partially repealed the FFOA by eliminating the immigration effect of the FFOA and its state counterparts. Second, basic laws of statutory construction show that Congress' intent was merely to delete the third prong of the Ozkok test, and not to fundamentally alter the parameters of the test and thereby reverse administrative rulings, including the ruling in Ozkok, upholding the effect of the FFOA and its state analogues, or of post-conviction relief.

1. Enactment of §1101(a)(48)(A) Did Not Repeal by Implication the Immigration Effect of the Federal First Offender Act or its State Analogues.

The text of §1101(a)(48)(A) does not on its face repeal the Federal First Offender Act. Thus, if there was a repeal, it must be by implication. In general, repeals by implication are "heavily disfavored," and may be found only where two statutes are in irreconcilable conflict or where one statute entirely displaces another. NLRB v. Kolkka, 170 F.3d 937, 941 (9th Cir.

1999). The Supreme Court has set forth the applicable rule regarding statutory interpretation:

> There are, however, two well-settled categories of repeals by implication (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. Radzanower v. Touche Ross & Co., 426 U.S. 148, 154, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976) (internal quotations omitted).

Neither category of repeal by implication is applicable. The legislature's intent is definitely not "clear and manifest."

The BIA's holding assumes that the enactment of §1101(a)(48)(A) repealed by implication the statement in the FFOA that a disposition under that section is not a conviction for purposes of "a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." (Emphasis added).

Repeal by implication only occurs when Congress expresses a "clear and manifest" intention to repeal. "[O]therwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same from the time of the first enactment." Posadas v. National City Bank, 296 U.S. 497, 56 S. Ct. 349, 80 L.Ed. 351, 355 (1936). Congress' silence

regarding 18 U.S.C. §3607 does not establish "clear and manifest" intent to repeal section 3607's language that a disposition is not a conviction for any purpose.

Since the provisions of 18 U.S.C. §3607 remains in force as a matter of law, Congress intended for discharged dispositions under its provisions not to be "considered a conviction." The BIA extends 8 U.S.C. §1101(a)(48) beyond the reach that Congress intended. The compulsory language in 18 U.S.C. §3607 creates an exception to the definition of conviction for federal first offenses. Prior administrative cases extend that exception to state counterparts of the Federal First Offender Act. There is no evidence that Congress intended to repeal those cases, especially where doing would implicate Petitioner's right to equal protection of the laws.

Furthermore, there is no conceivable reason why Congress would have wanted aliens found guilty of federal drug crimes to be treated more leniently than aliens found guilty of state drug crimes. Had Congress intended to repeal or partially repeal the Federal First Offender Act by passing the new definition of conviction, it could have easily have done so by express reference to the FFOA, or at minimum by including a "notwithstanding any other law" provision with respect to the new definition. Congress has done so in the past regarding new immigration

statutes. See, e.g., 8 U.S.C. §1252. The Court should assume that Congress was aware of the FFOA and the line of case laws related to it when the new definition was enacted. Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) (stating that Congress is presumed to be aware of administrative and judicial interpretations).

Therefore, Congress's failure to mention the Act, directly or indirectly, should compel the Court to conclude that Congress did not intend its repeal.

2. Congress Did Not Intend to Change the Nature or Subject Matter of the Limited Ozkok Definition of Conviction Ab Initio and Thereby Reverse Established Administrative Case Law on the Definition of Conviction, the Effect of the FFOA and State Counterparts, and the Effect of Post-conviction Relief.

The sole change that Congress made when it codified the Ozkok definition of conviction as INA §1101(a)(48)(A) was to delete the exception contained in the third prong of the definition. The Ozkok third prong was an exception to the definition of conviction, providing that a certain type of alternative state criminal disposition, i.e., a deferred adjudication that included the right to a subsequent merits hearing in the event of a probation violation, would never to amount to a conviction. Congress deleted that specific language, discussed the reasons for the deletion in the official legislative history, and exactly copied the remainder of the definition into

the statute. Congress did not intend to change the definition of conviction beyond deleting the third prong exception.

The BIA incorrectly held that Congress' deletion of the third prong "shows" Congress intent to reject the meaning of the remaining language that Congress retained from Ozkok. The INS would have the court rule that Congress codified the first and second prongs of Ozkok and explained why the third prong was deleted, only to conceive of the § 1101(a)(48)(A) definition as a startling new creation "that had never been used by the BIA or the courts." The INS would also have the court rule that the deletion of the third prong, plus the discussion of this change in the legislative history, shows that Congress "did not adopt the pre-existing judicial and administrative interpretations of what constitutes a conviction....", i.e., the rulings in Ozkok and other administrative and federal cases that recognized the mandate of the FFOA and state analogues, and specifically upheld the effect of post-conviction relief.

This assertion is flatly contradicted by the well-established rule that, absent express statement, Congress is held not to intend any such change when, as here, it codifies a judicially defined concept. Congress made no direct statement either in the statute or legislative history that it intended this momentous change in existing law. In the absence of such an explicit

statement, Congress intended to adopt the meaning of the definition as used in Ozkok. See Davis v. Michigan Department of Treasury, 489 U.S. 804, 811 (1989)("When Congress codifies a judicially-defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the construction placed on that concept by the courts."); Espinoza-Gutierrez v. Smith, 94 F.3d 1270, 1275 (9th Cir 1996); reh. and reh. en banc den., 109 F.3d 551 (9th Cir. 1997) ("When Congress adopts language from case law into statutes, there is a strong presumption that Congress intended the language to have the same purpose in the statute as it did in the common law").

Moreover, contrary to the BIA's holding, the presumption that Congress intends to retain the meaning of a provision it codifies is especially apt when Congress alters part of the provision to more exactly express its intent, as it did here by deleting the third prong. Lorillard v. Pons, 434 U.S. 575, 581 (1977) (presumption that Congress acted with knowledge is particularly appropriate where Congress "exhibited both a detailed knowledge of the [incorporated] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.") This conclusion is supported by the actual record of statutory enactment in this case. Congress merely subtracted a

discrete and easily divisible exception from the Ozkok definition, that in no way implicated the intent or parameters of the subject matter of the definition.

Congress is presumed to have known that the Ozkok definition of conviction was not intended to govern the effectiveness of post-conviction relief or analogues to the FFOA, much less eliminate the effect of such relief. Congress is presumed to have intended that same meaning when it took the definition of conviction from Ozkok, modified it by eliminating the third prong, and inserted it into §1101(a)(48)(A).

The BIA's analysis is flawed. In attempting to support its incorrect claim that Congress intended to profoundly change the subject matter of the definition of conviction and thereby eliminate the immigration effect of state analogues to the FFOA and of post-conviction relief in general, the BIA mischaracterizes controlling rules of statutory construction and the legislative history of §101(a)(48)(A), and disingenuously omits to acknowledge or discuss key aspects of Matter of Ozkok, from which Congress drew the text of §1101(a)(48).

3. Congress' Use of the Word "Means" in §1101(a)(48)(A) Does Not Show Congress' Intent to Change the Applicability of Dispositions under the Federal First Offender Act, State Analogues to the Federal First Offender Act, and the Nature of the Ozkok Definition.

Congress' use in §1101(a)(48)(A) of the word "means" rather than "includes" does not demonstrates Congress's intent that no legal ruling beyond the initial finding of guilt and imposition of punishment can have any immigration effect. According to the INS, consideration of any later ruling such as vacation of judgment or expungement would constitute an improper "exception" to the definition of conviction.

The INS argument is erroneous and begs the question at issue. Petitioner agrees that under the statute a conviction "means" a finding of guilt and imposition of punishment or restraint. However, for the same reasons set forth above, the INS is wrong as to the subject matter meant to be governed by this definition. Ozkok made it plain that the definition only addressed what is a conviction ab initio, and that the determination of whether any subsequent legal event will remove a conviction was not governed by this definition. Under the Ozkok definition of conviction, post-conviction relief is not an "exception" to the definition of conviction, but is a different subject not governed or addressed by the definition.

Further, 8 U.S.C. §1101(a)(48)(A) must be read in harmony with 8 U.S.C. §3607. As discussed above, §3607 provides an exception to the definition of conviction that applies for every legal purpose, when it states that a disposition under §3607 "shall not be considered a conviction for the

purpose of a disqualification or a disability imposed by law upon conviction of a crime, **or for any other purpose**." (emphasis mine). As discussed in Part III, the rule governing the FFOA and state analogues apply in immigration proceedings.

B. The Rule of Lenity Requires the Court to Resolve Ambiguities in the Statute in Favor of the Petitioner

Petitioner asserts that for the above stated reasons Congress' intent in enacting §1101(a)(48)(A) was clear. However, if Congress should find that the statute is ambiguous, any doubt should be read in Petitioner's favor. See INS v. Cardoza-Fonseca, 94 L. Ed.2d at 459 (the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" is appropriately employed in the first prong of the Chevron inquiry.)

C. The BIA's Construction is Not Entitled to Deference. Even if the Court Employed a Deferential Review It Must be Rejected Because It Is Impermissible.

Petitioner asserts Congress' clear and direct intent obviates the need to move to the second part of the Chevron analysis. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). If this court disagrees, however, then the BIA opinion is not entitled to agency deference

because the BIA opinion on appeal contradicts earlier rulings such as Matter of Marroquin, A90 509 015 LA (BIA 2/21/97) (unpublished, en banc opinion holding that enactment of 1101(a)(48)(A) does not invalidate effect of expungement).

The INS cannot cite any authority that prior inconsistent agency decisions must have been "final" in order to diminish deference under the Chevron test.

Moreover, although Matter of Marroquin, supra, was certified to the Attorney General, it remained controlling law. This is the BIA's view. See Matter of E-L-H, Int. Dec. 3345 (BIA 1998) (A BIA opinion that is certified to the Attorney General but not vacated remains in effect). Moreover, this is the reality. The ruling in the en banc opinion Matter of Marroquin, although unpublished, has controlled every single case presenting this issue that the BIA has considered in the two years from the date Marroquin was decided until the publication of the instant case, which overruled it. For two years Marroquin has functioned for the BIA as binding precedent on a very pressing and commonly presented issue; it is not merely a "single, unpublished decision" of little importance to the BIA. Finally, even under a deferential standard of review, the BIA's construction of the statute cannot be upheld because it is unreasonable and impermissible.

III. RESOLUTION OF THE EQUAL PROTECTION ISSUE NEED NOT WAIT FOR THE BIA TO DECIDE WHETHER THE FFOA'S NO CONVICTION PROVISION SURVIVES §1101(a)(48). THE COURT MAY DECIDE THAT PURE QUESTION OF LAW NOW.

If the court were to disagree with Vasquez-Velezmoro 's construction of §1101(a)(48), it still must reach the equal protection issue he has raised. The court needn't wait for the BIA to decide, at some unpredictable future date, whether §1101(a)(48) compels reversal of its present determination that disposition under the Federal First Offenders Act (FFOA) is not a conviction for immigration purposes. The court can and should resolve that pure question of law now.

The BIA is on record as concluding that FFOA disposition is not a conviction for immigration purposes. Matter of Werk, 16 I&N Dec. 234 (BIA 1977). Unless it actually decides to reverse itself, that remains the agency's view of the law. That the BIA might some day change its position and thereby eliminate its own disparate treatment between federal and state offenders is, in other words, pure conjecture.

Second, there is no getting around the fact that disposition under the FFOA is not a conviction "for any ... purpose." So whether §1101(a)(48) has any bearing on that provision of law is a "pure question of statutory construction for the courts to decide." INS v. Cardoza-Fonseca, 480 U.S.

421, 446 (1987). The traditional rules of statutory construction compel the conclusion that Congress did not, by enacting §1101(a)(48), intend to modify the FFOA's no conviction provision. That provision, therefore, remains an exception to the new statute's definition of conviction for immigration purposes.

Thus in Patel v. INS, 638 F. 2d 1199 (9th Cir. 1980), the court could not determine whether Patel was qualified to become a permanent resident of the U.S. but only whether the BIA had properly interpreted a regulation dealing with that issue. The same was true for SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), the case referenced in Patel.

For the reasons already noted, however, Congress did not, indeed could not, delegate to the Attorney General the exclusive authority to determine the pure legal question of whether the general language of §1101(a)(48) overrides Congress's specific mandate that disposition under the FFOA is no conviction for any purpose.

There simply is no conflict between the two statutes. "[W]hen statutes are capable of co-existence, it is the duty of the courts to regard each as effective." Radzanower v. Touche Ross Co, 426 U.S. 148, 154 (1976), quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936). Since Congress specifically mandated that disposition under the FFOA is not a

conviction "for any ... purpose," that provision, as the more specific, must be read as an exception to §1101(a)(48).

Thus, when faced with conflicting statutory mandates, the rule is that the "most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute." Natural Resources Defense Council v. U.S. E.P.A., 824 F. 2d 1258, 1278 (1st Cir 1987) (Emphasis added). But even without regard to which came first, a specific statute controls over a general one. See e.g. Radzanower v. Touche Ross & Co., supra, 426 U.S. at 153, ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"; Donaldson v. U.S., 653 F. 2d 414, 418 (9th Cir. 1981) ("It is also basic that where there is no clear legislative intent to the contrary, a specific statute will not be controlled by a general statute, irrespective of the priority of enactment").

It follows that although §1101(a)(48) is the later provision, it cannot override the FFOA because the latter is the more specific; that is, while

§1101(a)(48) deals with convictions for immigration purposes generally, it must give way to the more specific limitation of the FFOA which is that disposition under the FFOA is not a conviction "for any ... purpose." What could be more specific than that? Under that familiar rule of statutory construction, therefore, the FFOA provision necessarily survives §1101(a)(48).

Once the court determines that the FFOA's no conviction rule survives §1101(a)(48), it must also decide that Congress intended the same benefit for state counterparts of the FFOA. Otherwise, the court would have to confront the constitutional issue of whether such disparate treatment denies equal protection to those persons like Vasquez-Velezmoro who are unlucky enough to have been convicted of the same offense in state rather than federal courts. Paredes-Urrestarazu v. INS, supra at 811-12. By interpreting the statute to also deem individuals with state offenses as not having a conviction "for any purpose" when these individuals, if subject to federal law, would have been eligible for treatment under the FFOA, this court avoids the constitutional issue as it should do if at all possible. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154-155 (1941), Frankfurter J, concurring.

But should the court determine that Congress did not intend extension of the FFOA's no conviction rule to state counterparts, then it must decide whether such disparate treatment does indeed constitute a denial of equal protection to Vasquez-Velezmoro and the others convicted in state court of an offense that would not result in deportation had they been convicted under federal law. For all intents and purposes, the Ninth Circuit has already held this in Garberding v. INS, supra. There, the Court held that the BIA's failure to treat state offenders, like Mr. Vasquez-Velezmoro, the same as federal offenders would be treated under the FFOA, violated equal protection. Id. at 1191. If Congress is deemed to have made the same irrational distinction, then the statute itself must violate equal protection.

Finally, any argument suggesting that the court must await some future decision by the BIA could lead to the following absurd result. If the court, for example, were to buy the government's wait and see what the BIA does argument, Vasquez-Velezmoro and others like him could be deported in the meantime. Then suppose that the BIA eventually re-affirms Matter of Werk, supra, by deciding that the FFOA's no conviction rule does survive §1101(a)(48). In that scenario, Vasquez-Velezmoro and the others would have been deprived of their right to raise the equal protection issue.

They would have been precluded from asking the court to determine that the "fortuitous circumstance" of their convictions in state rather than federal court has "no logical relation to the fair administration of the immigration laws or the so-called 'war on drugs.'" Garberding v. INS, 30 F. 3d 1187, 1191 (9th Cir. 1994). That cannot be what the court will permit to happen. It must get to the statutory construction and constitutional issues here and now.

IV. Conclusion

Therefore, for all of the above reasons and under the circumstances of this case Mr. Vasquez-Velezmoro should be allowed to apply for cancellation of removal for a nonpermanent resident because his Texas conviction for possession of a controlled substance is not a conviction under federal immigration laws due to the continued validity of the Federal First Offender Act which has not been directly or indirectly repealed.

Respectfully submitted,

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Dated: June 8, 2001

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief was served by 1st class mail to the Office of Immigration Litigation, PO Box 878, Ben Franklin Station, Washington D.C., 20044 on November 21, 2000.

_____
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CERTIFICATE OF COMPLIANCE

I certify that the Petitioner's opening brief, including headings, footnotes, and quotations, contains 7256 words, consistent with FRAP type-volume limitations. Table of contents, table of citations, statement with respect to oral argument, and any attached addendum are not included in this word count, as per FRAP 32(a)(7)(B)(iii).

_____

Phillip F. Fishman
Attorney at Law

CERTIFICATE OF WORD PROCESSING PROGRAM

I certify that the full text of the Petitioner's opening brief was prepared in Microsoft Word, version 2000.

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Phillip F. Fishman
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I certify that the enclosed 3 ½ Floppy diskette, containing the full-text of the Petitioner's opening brief was scanned by McAfee VirusScan 99 and is virus-free.

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